Supreme Court, U. S.
FILED
MAR 5 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of The United States

No. 78-1363

HOMER LEE (MIKE) MILLER, JR.
and
MALCOLM B. DAVIS,
Petitioners

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OCTOBER TERM, 1978

No. . . . . .

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MALCOLM B. DAVIS,
Petitioners

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit entered on February 2, 1979.

JURISDICTION

The judgments of the Court below were entered on February 2, 1979 (Appendix A). Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

OPINION BELOW

The opinion of the Court of Appeals in Petitioner Miller's case is reported at 588 F 2d 1030. The opinion in Petitioner Davis' case is reported at 588 F 2d 1041.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court below erroneously approved the routine employment of electronic surveillance under 18 U.S.C. §2518 in investigations involving alleged violations of 18 U.S.C. §1955.

2. Whether, in this case, the Court erred in failing to sustain a motion to suppress evidence obtained as the result of court-approved electronic surveillance (telephone wiretaps) where the proof shows that it was "standard procedure" to seek a wiretap in gambling cases, thereby nullifying the express requirement of 18 U.S.C. §2518 that normal investigative procedures be demonstrably inadequate.

3. Whether the "five or more persons" requirement of 18 U.S.C. §1955 (illegal gambling business) is satisfied simply upon a showing that two independent bookmaking operations, each of less than five persons, had occasional contacts without proof that those contacts were essential to the success of each operation.

STATUTES INVOLVED

I. The procedure for interception of wire or oral communications is set forth in 18 U.S.C. §2518 (Appendix B). The pertinent parts thereof are §§(1)(c) and (3)(c).

A. *18 U.S.C. §2518(1)(c)* provides that any application for an order authorizing interception of a wire communication must contain "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous".

B. *18 U.S.C. §2518(3)(c)* requires that the judge to whom such application is made must make a factual determination that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous."

II. 18 U.S.C. §1955 (Appendix C) makes it an offense to conduct, finance, manage, supervise, direct, or own all or any part of an illegal gambling business. The part thereof germane to the issues raised herein is §(b)(1)(ii).

A. *18 U.S.C. §1955(b)(1)(ii)* defines an illegal gambling business as one which "involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business . . ."

STATEMENT OF THE CASE

Petitioner Homer Lee (Mike) Miller, Jr., and six other defendants were tried before a jury in the United States District Court for the Northern District of Texas pursuant to an indictment alleging a violation of 18 U.S.C. §1955 (engaging in an illegal gambling business). Petitioner Miller and five of the others were found guilty. Petitioner was later tried for and convicted of an offense arising out of the same transaction, but said conviction

was reversed by the Court of Appeals, on double jeopardy grounds, in *United States v. Robinson,* 588 F 2d 1041 (5th Cir. 1979).

Petitioner Davis was tried along with Petitioner Miller and another in a separate trial. The evidence in that trial was essentially the same as that adduced in the first trial, flowing from the same telephone wiretap authorization and interception. A single hearing on Motions to Suppress the intercepted communications was held for all defendants in both cases.

In large part the Government's evidence at trial was obtained through telephone wiretaps pursuant to authorization applied for and issued under 18 U.S.C. §2518. The testimony revealed that four of the defendants conducted a bookmaking operation in the panhandle region of Texas (the Amarillo operation). Petitioner Miller and Davis were engaged in a bookmaking operation in Dallas (the Dallas operation), several hundred miles away from the Amarillo operation. More than 3,000 calls were intercepted and recorded by F.B.I. agents as a result of wiretaps on telephone at the two locations. The Government introduced sixteen of these calls before the jury, which revealed some calls from the Amarillo operation to the Dallas operation during which the Dallas operation gave "line" information and accepted some bets from Amarillo. No calls were placed to Amarillo from Dallas, nor did Dallas ever place bets with or receive "line" information from Amarillo.

Government "experts" testified that efficient bookmakers balance their books by making "lay-off" bets with other bookmakers when they get too much play on one side of a contest. This assures that they will neither win nor lose money on the bets they accept, showing their profit from the 10% "juice" they collect from

losing bettors. These "experts" also testified in broad fashion that if a bet was between bookmakers, it must be a lay-off bet, even though they inconsistently admitted that it was certainly possible that bets between bookmakers were not always lay-off bets (Tr. 51-53, 947, 1060, 1099).*

As stated, the bulk of the Government's evidence was obtained as a result of wiretaps on telephones at the two locations. These taps were operated from November 27, 1975, through December 9, 1975 (Tr. 780). The affidavit presented to the district judge contained boilerplate assertions that informants were unwilling to testify and that searches were of limited value in gambling cases. At the hearing on Motion to Suppress the applying agent revealed that it was "standard procedure" to get wiretaps in gambling cases (M/S 31, 56). He asserted in his affidavit that search warrants were ineffective because bookmakers do not keep records. Then, a few days later, in an affidavit in support of an application for a search warrant, he swore that bookmakers did keep such records which could be seized and used as evidence (M/S 31-36). His explanation of the inconsistency was unpersuasive. When asked why he did not attempt to obtain and execute a search warrant, he replied that "We just go the route of getting application and getting the wiretap and get on the phone, that's all." (M/S 31-32)

Petitioners contended at trial that there simply was not sufficient evidence of probative value that the Dallas operation was interrelated with Amarillo to the extent necessary to satisfy

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*Reference to the transcription of testimony given at the trial is thus: (Tr. .....); reference to testimony given at the hearing on Motion to Suppress is thus: (M/S .....).

the "five or more persons" requirement of 18 U.S.C. §1955. Neither judge nor jury agreed. The Court of Appeals also rejected Petitioners' complaint, propounding the rule that:

> where two or more otherwise separate operations which are engaged in the accepting and placing of bets on national sporting activities exchange line information regularly as to betting odds and place lay-off bets with each other, they may be treated as one business for the purpose of meeting the five or more persons requirement of 18 U.S.C. §1955 (558 F 2d 1030, 1037-1038).

Petitioners' complaints that the provisions of 18 U.S.C. 2518(1)(c) and (3)(c) had been ignored met with a similar fate, and the convictions of all defendants were affirmed, from which judgment this Petition is brought.

REASONS FOR GRANTING THE WRIT

This Petition presents important questions concerning the manner in which law enforcement agencies employ, and lower courts approve, the extraordinary investigative tools for which provision is made under Title 18 U.S.C. §§2510 et seq. (called the wiretapping law). Significant issues are raised herein that, as regards gambling and other "tough" cases, law enforcement has come to view wiretapping as a routine investigative measure to be employed in such cases because it is the most fruitful means of ferreting out criminal activity. A review of the many decisions dealing with the question reveals an alarming trend towards conclusory or "boilerplate" averments in applications for wiretap orders, the real tenor of which is simply that law enforcement agencies must have wiretaps because gamblers use telephones. We note, too, in comparing the pertinent parts of the applications discussed in lower court decisions, that many times the language used is virtually identical, leading to the conclusion that, contrary to the intent of the legislature, the government has come to view wiretapping as standard operating procedure in gambling cases. The Court of Appeals in this case said that "where the telephone itself is the means by which the crime takes place, regular resort to wiretap is not unreasonable." 588 F 2d 1030, 1036.

The belief that §1955 cases are "telephone" crimes for which prosecution may succeed only if wiretaps are "regularly" used may be an accurate one. Legislation authorizing special treatment of such crimes might be appropriate. But the fact remains that the existing wiretap laws are designed to prohibit the "regular" or routine use of electronic eavesdropping in *all* of the designated cases. 18 U.S.C. §2516. No special exceptions exist for "telephone" crimes. Yet the Court of Appeals below approves such routine use thereby rendering the worthy protections of §§2518(1)(c) and (3)(c) mere formalities.

By its ruling below the Court of Appeals has judicially abrogated the important safeguards so carefully built into the wiretapping laws. This Court must take action to revitalize those laws to insure that both the letter and the spirit thereof are properly observed.

This Petition also presents the question when and under what circumstances separate individuals and entities may be combined as one enterprise for the purpose of satisfying the "five or more persons" requirement of 18 U.S.C. §1955. The Court of Appeals decision below differs in significant respects from principles announced in other circuits and inserts in §1955 a rule of judi-

cial interpretation which is not reasonably within the scope of that statute. In effect, we submit, the Court of Appeals below looked at the evidence presented and fashioned a rule to go around it. It is a poor fit.

QUESTION NUMBER ONE

1. WHETHER THE COURT BELOW ERRONEOUSLY APPROVED THE ROUTINE EMPLOYMENT OF ELECTRONIC SURVEILLANCE UNDER 18 U.S.C. §2518 IN INVESTIGATIONS INVOLVING ALLEGED VIOLATIONS OF 18 U.S.C. §1955.

QUESTION NUMBER TWO

2. WHETHER, IN THIS CASE, THE COURT ERRED IN FAILING TO SUSTAIN A MOTION TO SUPPRESS EVIDENCE OBTAINED AS THE RESULT OF COURT-APPROVED ELECTRONIC SURVEILLANCE (TELEPHONE WIRETAPS) WHERE THE PROOF SHOWS THAT IT WAS "STANDARD PROCEDURE" TO SEEK A WIRETAP IN GAMBLING CASES, THEREBY NULLIFYING THE EXPRESS REQUIREMENT OF 18 U.S.C. §2518 THAT NORMAL INVESTIGATIVE PROCEDURES BE DEMONSTRABLY INADEQUATE.

These two issues will be discussed together. Two important points should be noted at the outset. First is the increasing frequency (as demonstrated below) with which boilerplate averments are made in wiretap applications, averments which, when distilled down to the substance, simply say that in all gambling

cases telephone wiretaps must always be authorized if prosecution is to be successful. Second is the admission by the F.B.I. in this case that a wiretap is the standard procedure in gambling cases.

In *United States v. Giordano,* 416 U.S. 505 (1974), this Court reviewed the purpose of and history behind the laws, stating that wiretapping procedures "were not to be routinely employed as the initial step in criminal investigation". This policy conclusion is mandated by two things: first, the statute requires a showing of probable cause, §2518(3), (See *Berger v. New York,* 388 U.S. 41 [1967]); thus, no wiretap could ever truly be an "initial step", and, second, the statute requires a showing that "normal" investigative procedures have failed or are not reasonably likely to succeed. §2518(3)(c).

The point to be made here is that the statute recognizes that wiretapping is an *exceptional* procedure, and the legislature made it perfectly clear that it must not be used as a "normal" tool. This distinction, so carefully drawn in the law, has been eroded away until finally, as the Court of Appeals held below, the exceptional procedure has actually become the "normal" procedure, in "telephone crime" cases at least. Indeed, the requirements of §§2518(1)(c) and (3)(c) have become mere formalities.

In *United States v. Kalustian*, 529 F 2d 585 (9th Cir. 1976), the Court of Appeals seemed to sense the growing trend of law enforcement to take the position that "all gambling (cases) are tough to crack, so the Government need show only the probability that illegal gambling is afoot to justify electronic surveillance." But, as that Court succinctly put it, "Title III does not support that view." 529 F 2d 585, 589. The Court in *Kalustian* made the per-

tinent observation that the Government should establish why a particular gambling case presents "any investigative problems which were distinguishable in nature or degree from any other gambling case". That observation rightfully recognized the prosecution's burden of proof.*

The concern expressed in *Kalustian* was echoed in *United States v. Landmesser,* 553 F 2d 17 (6th Cir 1977), *cert. denied* 434 U.S. 855, *rehearing denied* 434 U.S. 961 (1977). There the Court noted that the mere fact that an affidavit rested in part on statements that would be equally applicable to almost any gambling case would not necessarily render the affidavit deficient. The Court went on to say that:

> What is required in addition, however, is information about particular facts of the case at hand which would indicate that wiretaps are not being "routinely employed . . ." (553 F 2d 17, 20).

The burden is placed upon the Government to show that wiretaps are not routinely employed. Here not only did the Government fail to carry that burden, but its agent admitted that wiretaps are "standard procedure". Then, after paying lip service to the boilerplate allegations that (1) informers are unwilling to testify (a universal *truth*) and (2) that searches are of limited value (a universal *claim,* though belied by the testimony below), the Court of Appeals, faced with the "standard procedure" testimony, holds that "regular resort to wiretap is not unreasonable".

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*Not only was there no effort here to bring such proof, the evidence shows, and the affidavit seems to rely on, the fact that gambling cases have proven to be all alike based upon the experience of the law enforcement agents.

The Court's disclaimer notwithstanding, its decision does have the effect of rendering Sections (1)(c) and (3)(c) mere formalities.

The decision below destroys the critical and carefully established distinction between ordinary and extraordinary investigative procedures. It ignores the plainly expressed fear of congress that wiretapping might "become established as a routine investigative recourse of law enforcement authorities". *United States v. Vento,* 933 F 2d 838 (3rd Cir. 1976). It conflicts with the holdings of other circuit courts by failing to observe the requirement that the Government demonstrate that "investigators (do) not attempt to employ wiretaps routinely or as the first step in their investigation." *United States v. Martinez,* 588 F. 2d 1227 (9th Cir. 1979); *United States v. Vento, supra; United States v. Landmesser, supra.*

Finally, the Court below fails to recognize that the "boilerplate" language heretofore condemned by the judiciary has not fallen into disuse but has only been disguised. See *United States v. Kerrigan,* 514 F 2d 35 (9th Cir. 1975). When the testimony given below at the hearing on Motion to Suppress is viewed in its totality, we see that the law enforcement agents believe that "normal" investigative procedures will never work in any §1955 case. The affidavit says as much, too, for it contains repeated reference to the "experience" of the agents in other gambling cases and relies on that experience to assist in establishing probable cause. If the agents did not think all these cases were alike, their experiences would have little probative value. Consequently, what *might* once have been viewed as a recitation of "additional facts" in support of boilerplate conclusions as to the likelihood of success of "normal" techniques has now itself become the boilerplate. Petitioner

has not found any reported decision (on this point) where the affidavit did not contain the standard allegations of unwillingness of informers, the limited value of searches, or the suspicious nature of bookmakers.

The Government must do more than "merely characterize a case as a 'gambling conspiracy' or a 'drug conspiracy' or any other kind of case that is in general 'tough to crack'." *United States v. Abascal*, 564 F 2d 821 (9th Cir. 1977). Yet when the matter is stripped down to the bare essentials, that is all the opinion of the Court below requires. When the Government says "informers are unwilling" or "searches will not help", it is saying no more than "gambling case", or as the lower court described it, "telephone crime".

Bookmakers and gamblers were prosecuted successfully before electronic surveillance laws were passed. It is not a defensible position that with the advent of legal wiretaps suddenly nothing else will work. Yet it is now "normal" to utilize wiretaps in §1955 cases, not so much because other investigative tools have ceased to function but rather because it is so much easier to build a successful case for the prosecution.

In a very real sense, all §1955 cases are alike. That law enforcement agents so view them is firmly established by the evidence below and by comparison with other cases. If, as is so often claimed in affidavits, §1955 cases cannot be prosecuted without wiretap evidence, the Congress may address itself to that problem and either amend the present law or enact specific legislation allowing the "regular" use of wiretaps in such cases, within Fourth Amendment bounds. But we have demonstrated

here that the current statutes recognize the difference between "normal" tools and wiretaps. Neither law enforcement nor the judiciary can permit the two to merge.

The decision of the Court of Appeals approving "regular" utilization of wiretaps abrogates §§2518(1)(c) and (3)(c). Under the facts of this case the Court should reverse the judgment entered below.

QUESTION NUMBER THREE

3. WHETHER THE "FIVE OR MORE PERSONS" REQUIREMENT OF 18 U.S.C. §1955 (ILLEGAL GAMBLING BUSINESS) IS SATISFIED SIMPLY UPON A SHOWING THAT TWO INDEPENDENT BOOKMAKING OPERATIONS, EACH OF LESS THAN FIVE PERSONS, HAD OCCASIONAL CONTACTS WITHOUT PROOF THAT THOSE CONTACTS WERE ESSENTIAL TO THE SUCCESS OF EACH OPERATION.

As noted above, two separate bookmaking operations, each of less than five persons, were established below. Petitioners here were connected with the Dallas operation only. The proof in each trial was essentially the same: the Amarillo operation occasionally placed calls to Dallas, sometimes receiving "line" information and somtimes placing bets. The Dallas operation never placed bets nor received line information.

Government experts opined that the bets were lay-off bets because any bets between bookmakers who play the same kind of sporting events will always be lay-off bets. As noted, however, the experts inconsistently conceded that it was possible that the bets between bookmakers were not always lay-off bets.

The Court of Appeals correctly observed below that the two operations must be linked together in order to establish the "five or more persons" requirement. 588 F 2d 1030, 1037. The manner in which the lower court determined the sufficiency of this link is the basis for the Petitioners' complaint herein.

The Court of Appeals has recognized that the "difficult question" is when and to what extent evidence of exchange of bets and line information suffices to create an illegal gambling business under §1955. *United States v. Milton,* 555 F 2d 1198 (5th Cir. 1977). The Court conceded that "isolated and casual lay-off bets between bookmakers may not be sufficient to establish that one bookmaker is conducting or financing the business of a second". *United States v. Milton, supra,* at 1201; *United States v. Boyd,* 566 F 2d 929 (5th Cir. 1978). It is additionally required that the proof show that "the receipt of line information substantially affects the other's business or that there is a constant exchange of line information between the two . . ." *United States v. Milton, supra; United States v. Boyd, supra.*

Other circuits state the rule for application in different terms, such as "constant communications" between the two operations, lay-off bets between them on a day-to-day basis and regular exchange of line information. See *United States v. Bobo,* 477 F 2d 974 (4th Cir. 1973). The First Circuit test seems to be that the proof show regular lay-off betting and exchange of line information that can be characterized as "necessary and useful" to one operation, *United States v. Santarpio,* 560 F 2d 448 (1st Cir. 1977), or viewed as "indispensible" to the operation. *United States v. DiMuro,* 540 F 2d 503 (1st Cir. 1976).

In *United States v. Leon,* 534 F 2d 667 (6th Cir. 1976), the Government's wiretaps revealed some fifteen calls between two bookmaking operations, neither of which involved five persons, during which bets were placed and line information exchanged. Government experts testified in general terms about the nature of bookmaking and its inherent need for balancing through placement of lay-off bets. However, there, as here, bets were only placed by one bookmaker; the other only accepted bets. In *Leon,* the Government's experts were not able to flatly conclude that the bets placed were lay-off bets, nor was there evidence that bets were *bilaterally* exchanged. The Court of Appeals concluded that the evidence was insufficient to link the two operations together for purposes of the "five or more persons" requirement, finding too little evidence of "concert of purpose" to justify merger of the two separate operations. The Court of Appeals in this case came to the opposite conclusion on virtually the same evidence.

Here, about the same number of intercepted calls were introduced. Here, bets between the operations flowed one way only. Here, the Government's expert witness gave inconclusive and relatively weightless testimony in that while he first gave the opinion that the calls reflected lay-off bets, that opinion was formed from his belief that bookmakers who bet with each other are always making lay-off bets. He retreated quickly to the position that such bets would be lay-offs in cases where bookmakers both bet the same type of sporting events. (Tr. 1060). His retreat was total when he finally said all bets between bookmakers need not be lay-offs. (Tr. 1099). The expert's initial, and most damaging, opinion is thus rendered quite inconclusive.

This case compares favorably with *Leon* in other respects. Here there was no direct evidence to show that the Petitioners conducted, financed, managed, supervised, directed or owned all or any part of the Amarillo operation. The telephone calls were always from Amarillo to Dallas. There was no showing that Petitioners placed any bets with Amarillo. The Government's expert testimony is shown to be even less credible by the fact that Amarillo often bet basketball games with Dallas but it was never shown that Amarillo accepted bets on basketball, thus tending to show that the bets were not lay-offs since there was nothing to show that both operations played the same sporting events.

As to the evidence that the Dallas Petitioners gave line information to Amarillo, it is recognized that no bettor would ever place a bet without knowing the line. See *United States v. McCoy,* 539 F 2d 1050 (5th Cir. 1976).

In sum, the evidence is at best inconclusive to show that the Amarillo operation was any more than a customer of the Dallas operation. Under such circumstances the rule applied in *United States v Leon, supra,* should be involved, rather than the overly broad principles announced by the Court below.

Because of the divergence among the Circuits as to the proper scope of the "five or more persons" requirement of §1955, this Court should review the issue raised here. Upon balance, it should be determined that the rule observed by the Court below sweeps too broadly.

We note, as well, that even if the general rule observed by the Fifth Circuit is not deficient, the mutation of that rule upon which the Court determined the issue below is erroneous. Until

this case, the Court below considered it necessary that there be an "exchange" of bets and line information to justify merging two separate operations into one (to show that one operation was not simply a customer of the other). There being no evidence of such "exchanges" here, the Court radically revises its rule in an effort to fit it around the facts below.

The critical portion of the opinion is this:

> The rationale of the prior opinions was that the dealing with each other was an essential ingredient to the success of both operations. So it was here. Amarillo had to regularly receive line information and place lay-off bets in the proper operation of its business. The receipt of lay-off bets and the giving of line information was essential to the (Dallas) operation. 588 F 2d at 1038.

This paragraph changes the heretofore-recognized rule in a major, yet unacceptable, aspect. A close analysis reveals why.

First, there was no evidence below that the "receipt of lay-off bets and the giving of line information" was essential to the Dallas operation *in terms of its dealings with Amarillo.* The evidence supports only the *general* proposition that bookmakers need lay-offs and line information if they are to be successful bookmakers. In the same vein, the evidence supports only a *general* conclusion that Amarillo, to be successful, "had to regularly receive line information and place lay-off bets". The evidence does not prove the truth of such conclusion *in terms of Amarillo's dealings with Dallas.*

What the Court below has done is simply to formulate a rule that since bookmakers need to engage in lay-off betting and need line information, two operations may be merged under §1955

anytime there are contacts between the two, without a showing that these contacts be essential or that there be a concert of purpose. Such a rule abrogates an essential element of the offense, defined in §1955(a), that to be guilty a person must "conduct, finance, manage, supervise, direct or own" an illegal gambling business.

No longer is it necessary to establish a nexus between two operations showing that both conduct, finance, manage, supervise, direct or own the same business, for under the opinion below *all* bookmaking operations are linked as a matter of law because of their common needs to engage in lay-off betting and to receive line information. The Court below significantly and erroneously diminished the Government's burden of showing that there is, in fact, a single illegal gambling business. The statute was never intended to cut such a wide swath.

The Court of Appeals erred in holding that the evidence was sufficient, even when viewed in the light most favorable to the verdict. *Glasser v. United States,* 315 U.S. 60 (1942). The Court even more greviously erred in promulgating a rule overextending the contours of §1955. This Court should reverse.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari be granted.

PHIL BURLESON

BOB BASKETT

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Petition for a Writ of Certiorari was served on the Solicitor General, Department of Justice, Washington, D.C. 20530 by depositing same in the United States mail, first class, postage prepaid. All parties required to be served have been served herewith.

PHIL BURLESON

APPENDIX

APPENDIX A

UNITED STATES of America, Plaintiff-Appellee,

v.

Glen Albert CLEMENTS, Jr., Jerry Delbert Basden, John Joseph Bruzga, Coyle Allen Winborn, Thomas David Robinson and Homer Lee Miller, Jr., a/k/a Mike Miller, Defendants-Appellants.

No. 77-5492.

United States Court of Appeals, Fifth Circuit.

Feb. 2, 1979.

Defendants were convicted before the United States District Court for the Northern District of Texas, at Dallas, Robert Madden Hill, J., of engaging in a business involving five or more persons which violated state gambling laws, one defendant was also convicted of knowingly using a telephone for the transmission in interstate commerce of bets on sporting events, and defendants appealed. The Court of Appeals, Roney, Circuit Judge, held, inter alia, that: (1) detailed information in supporting affidavit provided the court, which issued wiretap order, with ample material with which to test the reliability and credibility of affiant's informants and the information showing probable cause to believe illegal activity was taking place, and (2) the evidence was clearly sufficient to satisfy the law of the Fifth Circuit as to the required nexus of two apparently separate gambling businesses in order to treat them as one; specifically, the Dallas-Fort Worth business regularly gave line information to and accepted lay off bets from the Amarillo operation.

Affirmed.

1. Telecommunications ⇐496

When the facts that show probable cause for the issuance of a wiretap order are provided by informants, the supporting affidavit must pass a two-pronged test: first, the judge must be informed of some of the circumstances relied upon by the informant, and second, facts must be shown from which the affiant concluded that the informant was reliable so the judge can make an independent determination of probable cause. 18 U.S.C.A. §§ 2518, 2518(3).

2. Telecommunications ⇐496

As regards a showing of probable cause for the issuance of a wiretap order, corroborative evidence may be used to justify reliance on an informant. 18 U.S.C.A. §§ 2518, 2518(3).

3. Telecommunications ⇐496

Detailed information in supporting affidavit provided the court, which issued wiretap order, with ample material with which to test the reliability and credibility of affiant's informants and the information showing probable cause to believe illegal activity was taking place. 18 U.S.C.A. §§ 2518, 2518(3).

4. Telecommunications ⇐496

While the affidavit supporting court-ordered wiretap in alleging a violation of state law, cited a state statute that had been repealed 22 months earlier, this mistake was insufficient to invalidate the wiretap. 18 U.S.C.A. § 2518; V.T.C.A., Penal Code § 47.03.

5. Telecommunications ⇐496

Where the affidavit in support of wiretap referred to the unwillingness of confidential informants to testify, the difficulty in developing a case through

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informants, and the limited value of searches in gambling operations, this information was sufficient for the court to make an independent determination of the necessity for a wiretap. 18 U.S.C.A. § 2518(1)(c).

6. Telecommunications ⇐496

Purpose of wiretap statute, providing in part that an application for an interception order must include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous," is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but simply to inform the issuing judge of the difficulties involved in the use of conventional techniques. 18 U.S.C.A. § 2518(1)(c).

7. Telecommunications ⇐496

Especially where the telephone itself is the means by which the crime takes place, regular resort to wiretaps is not unreasonable. 18 U.S.C.A. § 2518(1)(c).

8. Telecommunications ⇐496

Fact that a wiretap is regularly utilized does not render the application and averment of the unsatisfactory nature of conventional techniques a mere formality. 18 U.S.C.A. § 2518(1)(c).

9. Telecommunications ⇐496

The suggestion in search warrant application that a search might net temporary records did not contradict the statement in wiretap application that gamblers do not keep permanent records. 18 U.S.C.A. § 2518(1)(c).

10. Telecommunications ⇐496

Even assuming that the district court order in *Chapman* applied to the wire interceptions involved in the instant case, that order was not entered until June 1976, six months after the voice comparison in question; in any event, it did not appear that the search produced any evidence seized from premises in which that defendant had an interest.

11. Gaming ⇐62

To establish a violation of the federal gambling statute, it is necessary to prove that: (1) there has been a violation of the law of a state; (2) five or more persons were involved in the operation of the business, and (3) the operation continued more than 30 days or grossed more than $2,000 in a single day. 18 U.S.C.A. § 1955.

12. Gaming ⇐62

In prosecution for violation of the federal gambling statute, there was unquestionably a violation of Texas law, whose Penal Code plainly prohibits bookmaking. V.T.C.A., Penal Code § 47.03; 18 U.S.C.A. § 1955.

13. Criminal Law ⇐734

In prosecution for violation of the federal gambling statute, one element of which prosecution is proof of a violation of state law, the determination of the applicable state law is a question of law to be determined by the court. 18 U.S.C.A. § 1955.

14. Criminal Law ⇐304(9)

A court may properly take notice of a state law.

15. Gaming ⇐98(1)

In prosecution for violation of the federal gambling statute, the evidence was clearly sufficient to satisfy the law of the Fifth Circuit as to the required nexus of two apparently separate gambling businesses in order to treat them as one; specifically, the Dallas-Fort Worth business regularly gave line information to and accepted lay off bets from the Amarillo operation. 18 U.S.C.A. § 1955.

16. Gaming ⇐62

Where two or more otherwise separate gambling operations which are engaged in the accepting and placing of bets on national sporting activities exchange line information regularly as to betting odds and placed lay off bets with each other, they may be treated as one business for the purpose of meeting the five or more persons requirement of the federal gambling statute. 18 U.S.C.A. § 1955.

17. Criminal Law ⇐472

In prosecution for violation of the federal gambling statute, the Government was properly allowed to utilize the testimony of an expert witness who characterized Amarillo's bets with Dallas-Fort Worth as lay off bets. 18 U.S.C.A. § 1955.

18. Gaming ⇐98(1)

In prosecution for violation of the federal gambling statute, the statutory requirement of proving gross revenue in excess of $2,000 per day was satisfied by government expert's testimony that the total daily dollar volume of bets placed over monitored telephone lines at two locations, based on an analysis of the approximately 3,000 calls, totaled $899,855 for the 12-day period; furthermore, the trial tape played to the jury contained evidence that on one day bets totaling $34,000 were made between the Dallas-Fort Worth and Amarillo gambling operations, and this figure alone satisfied the statutory requirement. 18 U.S.C.A. § 1955.

19. Criminal Law ⇐400(1)

In prosecution for violation of the federal gambling statute, government expert's calculations, relative to the statutory requirement that the gross revenue of the operation exceed $2,000 in any single day, were admissible under Federal Rules of Evidence, rather than the time-consuming procedure of playing to the jury the tapes of all 3,000 intercepted telephone calls. 18 U.S.C.A. § 1955; Fed.Rules Evid. rule 1006, 28 U.S.C.A.

20. Gaming ⇐79(1)

Federal gambling statute reaches all those who "conduct, finance, manage, supervise, direct, or own all or part" of an illegal gambling business, and this includes employees. 18 U.S.C.A. § 1955.

21. Gaming ⇐79(1)

Anyone who performs a "necessary function" in the operation of an illegal enterprise is included within the sweep of federal gambling statute. 18 U.S.C.A. § 1955.

22. Gaming ⇐98(1)

Evidence which showed that defendant rented a motel room in a fictitious name which was used in the conduct of gambling operations, that telephone lines in the room were used for gambling, and that defendant was the payee of one check issued in payment of gambling debts and his business was the payee of another was sufficient to support beyond a reasonable doubt the jury determination that defendant performed a function necessary to the gambling operation. 18 U.S.C.A. § 1955.

23. Gaming ⇐98(1)

Evidence showing that, inter alia, defendant conveyed winnings to a bettor on four different occasions, that he was present when a codefendant, using a fictitious name, rented a motel room subsequently used for the gambling operation, and that two telephones used for gambling were registered in his name was sufficient to support defendant's convic-

tion beyond a reasonable doubt of violating the federal gambling statute. 18 U.S.C.A. § 1955.

24. Criminal Law ⇐784(1)

When the jury is properly instructed on the standards for reasonable doubt, an additional instruction on circumstantial evidence is confusing and incorrect.

25. Gaming ⇐102

In prosecution for violation of the federal gambling statute, the court's instruction that the statute "* * * was enacted pursuant to the power of Congress to regulate interstate commerce. It seeks to reach substantial gambling businesses which operate regularly, as distinguished from isolated or unsubstantial gambling operations," clarified the intended scope of the federal statute and did not prejudice defendants. 18 U.S.C.A. § 1955.

26. Gaming ⇐102

In prosecution for violation of the federal gambling statute, defendants' objection to the court's instruction that the jurisdictional five persons may include unnamed and unindicted persons was not only academic because seven were named and five properly convicted, but was also incorrect. 18 U.S.C.A. § 1955.

Appeals from the United States District Court for the Northern District of Texas.

Before GEWIN, RONEY and GEE, Circuit Judges.

RONEY, Circuit Judge:

This is a gambling case in which the bulk of the Government's evidence was obtained through telephone wiretaps. Defendants challenge their convictions on four major grounds: *first*, they attack the court order permitting the telephone taps, arguing that the supporting affidavit was deficient for a number of reasons; *second*, they assert the Government has failed to prove a violation of the federal gambling statute, 18 U.S.C.A. § 1955, in that there was neither (1) a violation of state law, (2) the requisite five persons in the business, nor (3) the required financial volume; *third*, two defendants challenge the sufficiency of the evidence; and *fourth*, they contend that the district court's instructions were erroneous. Finding that none of these contentions merit reversal, we affirm.

I. Facts

In the fall of 1975, defendants Basden, Bruzga, Clements, and Winborn conducted a bookmaking operation in the panhandle region of Texas ["Amarillo operation"]. At the same time, defendants Miller and Robinson were engaged in a bookmaking operation in the Dallas-Fort Worth area ["Dallas-Fort Worth operation"]. Bets were taken on sporting events, mainly college and professional football games. The operations were conducted primarily over the telephone. The defendants settled with bettors on a weekly basis, usually in person.

In November 1975, on the basis of tips from informants, surveillance and an examination of telephone records, the FBI obtained an authorization to conduct electronic surveillance of several telephone lines in both locations. It produced recordings of more than 3,000 calls which led to the indictment of the defendants.

The evidence adduced by the Government tended to show that the Amarillo operation, in addition to accepting bets, regularly received line information from and made lay off bets with the Dallas-Fort Worth operation. Lay off bets are made by one professional gambler with another in order to hedge against loss because of unevenness of bets made by customers. Line information is the current odds a gambler is willing to give on each game.

All six defendants were convicted of a violation of 18 U.S.C.A. § 1955 and § 2 for being engaged in a business involving five or more persons which violated state gambling laws. Defendant Bruzga was also convicted of a two-count violation of 18 U.S.C.A. § 1084 and § 2 for knowingly using the telephone for the transmission in interstate commerce of bets on sporting events.

II. The Wiretap Evidence

Defendants sought to suppress evidence produced by the court-ordered wiretap, attacking the underlying Government affidavit submitted to the court pursuant to 18 U.S.C.A. § 2518. They assert the affidavit was insufficient for essentially four reasons: the affidavit failed to show the requisite probable cause, failed to set forth properly that a state statute was being violated, failed to demonstrate that normal investigative procedures were inadequate, and contained misrepresentations.

1. *Probable Cause*

Subsection (3) of 18 U.S.C.A. § 2518 provides that a judge may enter an ex parte order authorizing interception of wire communications "if the judge determines on the basis of the facts submitted by the applicant that—(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit" certain enumerated offenses including participation in an illegal gambling operation.

[1, 2] When the facts that show probable cause are provided by informants, the affidavit must pass a two-pronged test: first, the judge must be informed of some of the circumstances relied upon by the informant, and second, facts must be shown from which the affiant concluded that the informant was reliable so the judge can make an independent determination of probable cause. Corroborative evidence may be used to justify reliance on an informant. *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

In his affidavit, FBI Agent Landers related information supplied by three confidential informants. The affidavit indicated that for a period of ten weeks the first informant related current and detailed information about Miller's Dallas-Fort Worth operation based on personal conversation with Miller. Corroboration was detailed in several respects. For example, information supplied by another informant corroborated Miller's claim that he conveyed line information to a large bookmaking operation in Amarillo. Information about an October 3, 1975 airport meeting was independently corroborated by local police surveillance. The affidavit also indicated that Miller had been arrested previously for gambling and fined on a bookmaking charge. The affidavit included an explicit claim of past reliability.

The information from the second informant came from a personal and recent conversation with Miller. The informant had proven reliable in supplying valuable information regarding gambling in the Dallas area for three years.

The third informant received information from conversations with defendant Bruzga in Amarillo. He was advised that a bookmaking operation was being conducted over certain phone numbers.

The informant placed bets over these numbers which according to telephone company records were listed to Young Advertising Co. c/o J. Young, Room 2, Texan Motel, Wildorado. Independent surveillance during this time placed Winborn and Bruzga at Room 2 of the motel on numerous occasions. The informant was represented to be credible and reliable over a four-year period which independent investigation had showed to be correct. In addition, local records showed that Bruzga had been arrested in 1970 on a charge of unlawful bookmaking, although no conviction resulted.

[3] The detailed information in the affidavit provided the court with ample material with which to test the reliability and credibility of the informant and the information that showed probable cause to believe that illegal activity was taking place. *See United States v. Scott*, 555 F.2d 522, 526 (5th Cir.), *cert. denied*, 434 U.S. 985, 98 S.Ct. 610, 54 L.Ed.2d 478 (1977).

2. *Miscitation of State Statute*

[4] Defendants contend the affidavit was insufficient and the order invalid because in alleging the violation of state law, it cited a state statute that had been repealed 22 months earlier. Tex. [Penal] Code Ann. tit. 10, § 652a (Vernon).

This mistake is insufficient to invalidate the wiretap. The affidavit accurately represented that gambling was unlawful under state law. Gambling such as that conducted by defendants was illegal under Texas law. Tex. [Penal] Code Ann. tit. 10, § 47.03 (Vernon) [1] outlaws it now, rather than the repealed statute cited in the affidavit. Defendants suffered no prejudice as a result of the miscitation of the applicable Texas statute. Both the rules and the cases provide that a citation error in an indictment is not grounds for dismissal or reversal. Fed.R.Crim.P. 7(c)(3); *United States v. Bethany*, 489 F.2d 91, 93 (5th Cir. 1974). We see no reason to apply a different rule to affidavits for wiretaps. *See United States v. Matya*, 541 F.2d 741, 746–747 (8th Cir. 1976), *cert. denied*, 429 U.S. 1091, 97 S.Ct. 1101, 51 L.Ed.2d 536 (1977), which upheld the grant of a wiretap where no statute was cited in the application.

3. *Inadequacy of Normal Investigative Procedures*

An application for an interception order must include

> a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous; . . .

18 U.S.C.A. § 2518(1)(c).

Defendants contend the application contained only the conclusion by Special Agent Landers that standard investigative techniques have not succeeded. Landers testified at the hearing on the motion to suppress that it was standard procedure in a gambling case to seek a wiretap. Defendants argue that to approve such an approach would effectively undermine any prior resort to other investigative procedures as required by the Act.

[5–8] The affidavit, however, did refer to the unwillingness of confidential informants to testify, the difficulty in developing a case through informants, and the limited value of searches in gambling operations. This information was sufficient for the court to make an independent determination of the necessity of the wiretap. As this Court has held, the purpose of § 2518(1)(c) "is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but simply to inform the issuing judge of the difficulties involved in the use of conventional techniques." *United States v. Pacheco*, 489 F.2d 554, 565 (5th Cir. 1974), *cert. denied*, 421 U.S. 909, 95 S.Ct. 1558, 43 L.Ed.2d 774 (1975). The provision "must be read in a common sense fashion." *United States v. Robertson*, 504 F.2d 289, 293 (5th Cir. 1974), *cert. denied*, 421 U.S. 913, 95 S.Ct. 1568, 43 L.Ed.2d 778 (1975); *United States v. Sklaroff*, 552 F.2d 1156, 1159 (5th Cir. 1977), *cert. denied*, 434 U.S. 1009, 98 S.Ct. 718, 54 L.Ed.2d 751 (1978). Especially where the telephone itself is the means by which the crime takes place, regular resort to wiretap is not unreasonable. The fact that a wiretap is regularly utilized does not render the application and averment of the unsatisfactory nature of conventional techniques a mere formality.

4. *Misrepresentations*

[9] Defendants claim the affiant made an intentional misrepresentation in the application for a search warrant. They point to an apparent conflict between the statement in the wiretap application that permanent records are not maintained by gambling operations and the statement in the search warrant application that there generally were large amounts of cash, betting slips, line sheets, adding machines, tape recorders, and an address book on the premises. The trial court was correct in its conclusion that there was no inconsistency between these statements. The suggestion that a search might net temporary records hardly contradicts the statement that gamblers do not keep permanent records.

5. *Use of Chapman Tapes for Voice Comparison*

[10] Defendant Robinson shows that a voice identification of him, set forth in an affidavit for search warrants, was based on a 1971 wire interception. He contends that in *United States v. Chapman*, CR3–2984 (N.D.Tex., order entered 6/15/76), District Judge Hughes by injunctive order prohibited institution of criminal charges based on information contained in the 1971 tapes. There is a question whether Judge Hughes' order applied to these wire interceptions at all. Assuming that it did, however, the order was not entered until June 1976, six months after the voice comparison which occurred in December 1975. In any event, it does not appear that the search produced any evidence seized from premises in which defendant had an interest.

1. Tex. [Penal] Code Ann. tit. 10, § 47.03 (Vernon) reads:

> Gambling Promotion
>
> (a) A person commits an offense if he intentionally or knowingly does any of the following acts:
>
> (1) operates or participates in the earnings of a gambling place;
>
> (2) receives, records, or forwards a bet or offer to bet;
>
> (3) for gain, becomes a custodian of anything of value bet or offered to be bet;
>
> (4) sells chances on the partial or final result of or on the margin of victory in any game or contest or on the performance of any participant in any game or contest or on the result of any political nomination, appointment, or election or on the degree of success of any nominee, appointee, or candidate; or
>
> (5) for gain, sets up or promotes any lottery or sells or offers to sell or knowingly possesses for transfer, or transfers any card, stub, ticket, check, or other device designed to serve as evidence of participation in any lottery.
>
> (b) An offense under this section is a felony of the third degree.

The trial court properly denied the motion to suppress the evidence produced from execution of the warrant.

III. Violation of Federal Law

[11] 18 U.S.C.A. § 1955 provides that:

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

In order to establish a violation of this section that a defendant is involved in a gambling business in violation of this statute, it is necessary to prove that (1) there has been a violation of the law of a state, (2) five or more persons are involved in the operation of the business, and (3) the operation has continued more than thirty days or grossed more than $2,000 in a single day.

1. *Violation of State Law*

Defendant Robinson contends that no violation of state law was proved because the Government failed to establish the alleged gambling business violated state law and did not request the court to take judicial notice of it.

[12–14] There is no question that there was a violation of Texas law. Section 47.03 of the Texas Penal Code plainly prohibits bookmaking. Section 47.03 was brought to the court's attention by the Government in its proposed instructions. The determination of the applicable state law is a question of law to be determined by the court. *See Hanley v. United States*, 416 F.2d 1160, 1164 (5th Cir. 1969), *cert. denied*, 397 U.S. 910, 90 S.Ct. 908, 25 L.Ed.2d 91 (1970). A court may properly take notice of a state law. The court properly instructed the jury on the applicable law.[2] No error has been shown.

2. *Five or More Persons*

18 U.S.C.A. § 1955 only applies to an illegal gambling business which "involves five or more persons . . ." In this case, the contention is made that the Amarillo business, involving four defendants in this case, could not properly be combined with the Dallas-Fort Worth business, involving two defendants, to satisfy the statutory requisite of "five or more persons." As far as the evidence in this case is concerned, the two businesses must be linked in order to sustain the conviction of all of these defendants.

[15] The evidence is clearly sufficient to satisfy the law of this Circuit as to the required nexus of two apparently separate gambling businesses in order to treat them as one. The simple facts are these: the Dallas-Fort Worth business regularly gave line information to and accepted lay off bets from the Amarillo operation.

In a series of gambling cases involving two operations, this Court has described the nature of such businesses, their dependency upon each other for profitable operation, and the reasons why they can be combined for the purpose of achieving the statutory requirement of five or more persons. *United States v. Boyd*, 566 F.2d 929 (5th Cir. 1978); *United States v. Milton*, 555 F.2d 1198 (5th Cir. 1977); *United States v. McCoy*, 539 F.2d 1050 (5th Cir. 1976), *cert. denied*, 431 U.S. 919, 97 S.Ct. 2185, 53 L.Ed.2d 230 (1977); *United States v. Joseph*, 519 F.2d 1068 (5th Cir. 1975), *cert. denied*, 424 U.S. 909, 96 S.Ct. 1103, 47 L.Ed.2d 312 (1976), 430 U.S. 905, 97 S.Ct. 1173, 51 L.Ed.2d 581 (1977).

[16] The principle of law established by this line of cases is this: where two or more otherwise separate operations which are engaged in the accepting and placing of bets on national sporting activities exchange line information regularly as to betting odds and place lay off bets with each other, they may be treated as one business for the purpose of meeting the five or more persons requirement of 18 U.S.C.A. § 1955.

There is a difference between this case and those that have heretofore been decided. Our prior opinions have discussed the "exchange of line information." Here, there was no "exchange" in the technical sense. Dallas-Fort Worth only gave line information; Amarillo only received it. Amarillo only placed lay off bets with Dallas-Fort Worth; it did not accept bets from Dallas-Fort Worth.

This difference is not controlling. The rationale of the prior opinions was that the dealing with each other was an essential ingredient to the success of both operations. So it was here. Amarillo had to regularly receive line information and place lay off bets in the proper operation of its business. The receipt of lay off bets and the giving of line information was essential to the Dallas-Fort Worth operation.

We perceive no error in combining the two businesses under the precedent of our prior cases.

[17] Although defendants object to testimony by an expert witness characterizing Amarillo's bets with Dallas-Fort Worth as lay off bets, we have previously sustained the use of expert witnesses to explain the nature of this kind of gambling business and to evaluate the evidence within the framework of the witnesses' expertise. *See United States v. Masson*, 582 F.2d 961 (5th Cir. 1978); *United States v. Milton*, 555 F.2d 1198 (5th Cir. 1977); *United States v. McCoy*, 539 F.2d 1050 (5th Cir. 1976), *cert. denied*, 431 U.S. 919, 97 S.Ct. 2185, 53 L.Ed.2d 230 (1977).

3. *Gross Revenue in Excess of $2,000 Per Day*

[18] Defendant Miller contends that there was no admissible evidence that the gross revenue of the operation was in excess of $2,000 per day. A Government expert testified that the total daily dollar volume of bets placed over the monitored telephone lines at the two locations based on an analysis of the approximately 3,000 calls totaled $899,855

2. In its instructions, the trial court read the entire text of Tex. [Penal] Code Ann. tit. 10, § 47.03 (Vernon), *id.* The instruction then continued:

> Section 47.03 defines and prohibits exploitative gambling. It is aimed at the professional gambler, one who solicits or aids others to gamble and profits from the gambling by playing with advantageous odds or by charging the other participants for use of the facilities or equipment. These are the elements that distinguish social gambling, in which the only possibility of exploitation arises from the superior skill of a player, from commercial gambling, in which the promoter is ensured a profit regardless of his skill or luck in playing the game.

for the twelve-day period.[3] The lowest daily total on lines 233–2262 and 2272 was $26,400 for November 27, 1975. The lowest daily total on the motel phones was $8,395.

Defendant argues that the testimony was improper as not all 3,000 tapes had been played to the jury. This argument ignores the fact that the trial tape played to the jury contains evidence that on December 7, 1975, bets totaling $34,000 were made between the Dallas-Forth Worth and Amarillo operations.[4] This figure alone satisfies the statutory requirement.

[19] The expert's calculations were admissible under Fed.R.Evid. 1006 which provides that:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

This rule was intended precisely for a case such as this where it would have been unnecessarily time-consuming to play the tapes of all 3,000 calls. For the purposes of Fed.R.Evid. 1006, the recordings need not have been introduced into evidence but only "made available." They were available.

An adequate foundation was laid for both the recordings and the "trial tape." An FBI agent with considerable experience in telephone interceptions testified in elaborate detail as to the mechanics of the wiretap. The accuracy of the equipment and training of the monitoring agents was established. Defendants made no objection as to the accuracy of the tapes, although afforded ample opportunity to examine them. The recordings were properly admitted. *United States v. Biggins*, 551 F.2d 64, 66 (5th Cir. 1977).

Contrary to defendant's argument, the criteria established by the Eighth Circuit in *United States v. McMillan*, 508 F.2d 101 (8th Cir. 1974), *cert. denied*, 421 U.S. 916, 95 S.Ct. 1577, 43 L.Ed.2d 782 (1975), *cited in United States v. Onori*, 535 F.2d 938, 947–948 (5th Cir. 1976), for the admission of recordings made by agents with the consent of an informant/participant do not apply where telephone conversations are monitored pursuant to court order, are voluntary and are not elicited by the Government. *Cf. United States v. Biggins*, 551 F.2d 64, 66 (5th Cir. 1977).

3. Total calls to 233–2262 and 2272

11/27 – 12/8

11/27	$ 26,400.00
11/28	106,980.00
11/29	81,400.00
11/30	132,050.00
12/1	40,650.00
12/2	37,300.00
12/3	39,375.00
12/4	32,975.00
12/5	69,650.00
12/6	106,475.00
12/7	166,600.00
12/8	42,000.00
Total	$ 881,855.00

Total calls on motel phones

11/27	$ 9,605.00
11/28	8,395.00
Total	$ 18,000.00

Grand total for the 12-day period:	$ 881,855.00
	18,000.00
	$ 899,855.00

4. Amounts of bets on 12/7 between Dallas-Fort Worth and Amarillo:

Call 1	$ 12,800.00
Call 2	4,000.00
Call 3	12,000.00
Call 4	6,000.00
Total	$ 34,800.00

IV. Sufficiency of the Evidence

[20, 21] Defendants Basen and Clements question the sufficiency of the evidence against them to support a conviction. The statute reaches all those who "conduct, finance, manage, supervise, direct, or own all or part" of an illegal gambling business. Employees are included. "The term 'conducts' refers both to high level bosses and street level employees." [1970] U.S.Code Cong. & Admin.News, p. 4029, House Judiciary Committee Report. Anyone who performs a "necessary function" in the operation of the enterprise is included within the sweep of the statute. *United States v. McCoy*, 539 F.2d 1050, 1060 (5th Cir. 1976), *cert. denied*, 431 U.S. 919, 97 S.Ct. 2185, 53 L.Ed.2d 230 (1977); *United States v. Joseph*, 519 F.2d 1068, 1071 (5th Cir. 1975), *cert. denied*, 424 U.S. 909, 96 S.Ct. 1103, 47 L.Ed.2d 312 (1976), 430 U.S. 905, 97 S.Ct. 1173, 51 L.Ed.2d 581 (1977).

[22] Taken most favorably to the Government, the evidence shows that Basden rented a motel room in a fictitious name which was used in the conduct of the gambling operation. Telephone lines in the motel room listed under the fictitious name and others located elsewhere in Basden's own name were used for gambling. Basden was the payee of one check issued in payment of gambling debts and his business was the payee of another. This evidence was sufficient to support a jury conclusion that beyond a reasonable doubt Basden performed a function necessary to the operation.

[23] Clements conveyed winnings from bets to a bettor on four different occasions. He was present when Basden, using a fictitious name, rented the motel room subsequently used for the operation. In addition, two telephones used for gambling were registered in his name.

Clements asserts there was no proof that the two telephone lines were located at his residence and that he was unaware of the purpose of the four payments or the motel rental. The telephone bills submitted into evidence were billed to Clements. Viewed most favorably to support the conviction, the evidence was sufficient to support a jury conclusion of guilt beyond a reasonable doubt.

V. Instructions

[24] Defendants raise several unmeritorious objections to the trial court's instructions. They object to the denial of a proposed instruction that a conviction cannot be obtained unless the evidence excludes every reasonable hypothesis of innocence. The rule in this Circuit is that "when the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect." *United States v. Stokes*, 471 F.2d 1318 (5th Cir. 1973), *relying upon Holland v. United States*, 348 U.S. 121, 140, 75 S.Ct. 127, 99 L.Ed. 150 (1954).

The instructions referring to "aiding and abetting" and on "agency" were justified by the evidence in the record.

[25] Defendants complain about the court's reference to the purpose of Congress in enacting 18 U.S.C.A. § 1955. The court stated that

> [S]ection 1955 was enacted pursuant to the power of Congress to regulate

interstate commerce. It seeks to reach substantial gambling businesses which operate regularly, as distinguished from isolated or unsubstantial gambling operations.

This charge clarifies the intended scope of § 1955, is proper, and does not prejudice defendants.

The definition of "business," examined in light of the entire charge and taken together with the instruction on congressional purpose, makes it clear that an illegal gambling business must be substantial and operate on a regular basis. *See, e. g., United States v. McCoy,* 539 F.2d 1050, 1063 (5th Cir. 1976), *cert. denied,* 431 U.S. 919, 97 S.Ct. 2185, 53 L.Ed.2d 230 (1977).

The term "conduct" as defined adequately reflects the law of this Circuit.

Defendants complain that the charge does not focus on issues peculiar to linking two independent gambling operations and that no definition of exchange of line information or lay off bets was given. They contend the jury should have been instructed that not every bet between bookmakers is a lay off bet and that occasional contacts or random encounters between the Dallas-Fort Worth and the Amarillo operations do not constitute a violation of § 1955. The terms "lay off," "line information," and "exchange of line information" were the subject of expert testimony. The court's instructions made it clear that a mere customer or bettor is not a participant in a gambling operation, and that a mere occasional bet would not create an illegal gambling operation.

Defendants contend the court should have instructed the jury that the defendants must know that five or more persons were involved. In *United States v. Alfonso,* 552 F.2d 605, 617 (5th Cir.), *cert. denied,* 434 U.S. 857, 98 S.Ct. 179, 54 L.Ed.2d 129, 434 U.S. 922, 98 S.Ct. 398, 54 L.Ed.2d 279 (1977), this Court upheld a refusal to give such an instruction.

[26] Defendants' objection to the court's instruction that the jurisdictional five persons may include unnamed and unindicted persons is not only academic because seven were named and five properly convicted, but also incorrect. In *United States v. Boyd,* 566 F.2d 929 (5th Cir. 1978), this Court held that an unknown outside source of line information could be included for purposes of the jurisdictional five.

VI. Conclusion

Finding the rulings and instructions of the trial court to be supported by the facts and the law and the verdict of the jury to be supported by sufficient evidence, we affirm defendants' convictions.

AFFIRMED.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

UNITED STATES of America, Plaintiff-Appellee,

v.

Thomas David ROBINSON, Homer Lee Miller, Jr., a/k/a Mike Miller, and Malcolm B. Davis, Defendants-Appellants.

No. 77-5604.

United States Court of Appeals, Fifth Circuit.

Feb. 2, 1979.

Defendants were convicted before the United States District Court for the Northern District of Texas, at Dallas, Robert Madden Hill, J., of gambling offenses, and they appealed. The Court of Appeals, Roney, Circuit Judge, held, inter alia, that: (1) two defendants, having been convicted in another case for their role in Dallas-Fort Worth gambling operation, were subjected to double jeopardy in the instant case; they were again tried and convicted for their Dallas-Fort Worth gambling activity notwithstanding additional connections between the Dallas-Fort Worth operation and the Austin and San Antonio gambling operations in the instant case, and (2) while the prosecutor, after counsel for one defendant had refused the prosecutor's request outside the courtroom to not release an expert witness so that he might be recalled for further testimony, improperly remarked, within earshot of several jurors, "He was going to run off anyway so it didn't make any difference," the trial court's subsequent instruction to the jury to disregard the incident was sufficient to remedy any prejudice which may have occurred.

Reversed in part and affirmed in part.

1. Criminal Law ⇐202(1)

Two defendants, having been convicted in another case for their role in Dallas-Fort Worth gambling operation, were subjected to double jeopardy in the instant case; they were again tried and convicted for their Dallas-Fort Worth gambling activity notwithstanding additional connections between the Dallas-Forth Worth operation and the Austin and San Antonio gambling operations in the instant case. 18 U.S.C.A. § 1955; U.S.C.A.Const. Amend. 5.

2. Criminal Law ⇐186, 187

Double jeopardy clause protects not only against a second prosecution for the same offense after acquittal, but against a second prosecution for the same offense after conviction. U.S.C.A.Const. Amend. 5.

3. Criminal Law ⇐195(1)

It must be shown that the two offenses charged are in law and in fact the same in order to sustain a double jeopardy claim. U.S.C.A.Const. Amend. 5.

4. Criminal Law ⇐295

Defendants have the burden of proving double jeopardy. U.S.C.A.Const. Amend. 5.

5. Criminal Law ⇐200(1)

Where the offense charged is conducting an illegal gambling business in violation of federal statute, the identity of time and place and the use of some overlapping evidence is not decisive on a claim of double jeopardy; in such a case, the determination of whether one or two offenses have taken place for double jeopardy purposes must rest upon the

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peculiar facts of each case. 18 U.S.C.A. § 1955; U.S.C.A.Const. Amend. 5.

6. Criminal Law ⇐195(2)

While two defendants could not be twice convicted for operating one gambling business, this did not mean that they could not be counted in the instant case toward the "five persons" necessary under the federal gambling statute for the conviction of any other persons involved in the gambling business. 18 U.S.C.A. § 1955.

7. Criminal Law ⇐730(1)

While the prosecutor, after counsel for one defendant had refused prosecutor's request outside the courtroom to not release an expert witness so that he might be recalled for further testimony, improperly remarked, within earshot of several jurors, "He was going to run off anyway so it didn't make any difference," the trial court's subsequent instruction to the jury to disregard the incident was sufficient to remedy any prejudice which may have occurred.

8. Gaming ⇐62

In a prosecution for violation of the federal gambling statute, exchange of line information becomes an issue only where independent gambling operations are linked together. 18 U.S.C.A. § 1955.

Appeals from the United States District Court for the Northern District of Texas.

Before GEWIN, RONEY and GEE, Circuit Judges.

RONEY, Circuit Judge:

[1] In *United States v. Clements*, —— F.2d —— (5th Cir. 1979) [No. 77-5492], we upheld the Government's contention that a gambling operation in Amarillo, Texas could be combined with a gambling operation in Dallas-Fort Worth which is the subject of the instant case in order to furnish the "five or more persons" necessary to create the gambling business proscribed by 18 U.S.C.A. § 1955. We hold here that two defendants, Robinson and Miller, having been convicted for their role in the Dallas-Fort Worth gambling operation in *Clements*, were subjected to double jeopardy in this case. They were again tried and convicted for their Dallas-Forth Worth gambling activity notwithstanding the additional connections between the Dallas-Fort Worth operation and Austin and San Antonio gambling operations in this case. We, therefore, reverse their convictions. As to the third defendant, Davis, who was not tried in the prior case, but who was shown to be a part of the Dallas-Fort Worth operation, we affirm his conviction against the contention that the trial court erred in not granting a mistrial, in refusing to give certain requested instructions, and in admitting evidence obtained under allegedly faulty warrants.

Facts

This case arose from the same FBI investigation of Texas gambling operations which gave rise to *United States v. Clements, supra*. The details of this investigation are adequately set forth in that case and need not be detailed here. The focal point of the instant prosecution was the Dallas-Fort Worth operation. The evidence at trial tended to show that defendant Miller, assisted by defendants Robinson, Davis, Jones, and Faulkner, ran a bookmaking business which accepted wagers on professional and collegiate sporting events. The gross revenues of the business exceeded a quarter of a million dollars a day during the period from September 1, 1975 through January 15, 1976. Two other defendants, Joseph and Salinas, whose trials were severed and who plead guilty, operated small gambling businesses interconnected with the Dallas-Fort Worth operation in Austin and San Antonio respectively. Defendant Jones entered a plea of guilty and was severed. The jury returned a verdict of guilty as to defendants Miller, Robinson, Davis, and Faulkner and not guilty as to defendant Stone. Miller, Robinson, and Davis appeal.

Miller/Robinson: Double Jeopardy

Defendants Miller and Robinson made timely pretrial motions for dismissal on grounds of double jeopardy which were carried pending receipt of the Government's evidence and then dismissed.

The claim of double jeopardy is based upon defendants' convictions in the companion case of *United States v. Clements*, —— F.2d —— (5th Cir. 1979) [No. 77-5492]. In that case, defendants Miller and Robinson were shown to conduct what the Government there termed "a Dallas-Fort Worth operation" which was linked to the Amarillo operation by the regular conveyance of line information and acceptance of lay off bets in sizable amounts. This Court affirmed defendants' convictions, holding the facts demonstrated a linkage between the Amarillo and Dallas-Fort Worth operation sufficient to permit Miller and Robinson to be counted together with the members of the Amarillo operation in order to satisfy the statutory requisite of "five or more persons."

[2-4] The Fifth Amendment of the United States Constitution forbids that "any person be subject for the same offense to be twice put in jeopardy of life or limb." The double jeopardy clause protects not only against a second prosecution for the same offense after acquittal, but against a second prosecution for the same offense after conviction. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). It is well settled that it must be shown that the two offenses charged are in law and in fact the same in order to sustain a double jeopardy claim. *United States v. Linetsky*, 533 F.2d 192, 197 (5th Cir. 1976). Defendants have the burden of proving double jeopardy. *United States v. Parker*, 582 F.2d 953 (5th Cir. 1978); *Rothaus v. United States*, 319 F.2d 528, 529 (5th Cir. 1963).

[5] Where the offense charged is conduct of an illegal gambling business in violation of 18 U.S.C.A. § 1955, the identity of time and place and the use of some overlapping evidence is not decisive.[1] In such a case the determination

1. 18 U.S.C.A. § 1955 reads in part:

Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

18 U.S.C.A. § 2, under which defendants also were charged, reads:

of whether one or two offenses have taken place for double jeopardy purposes must rest upon the peculiar facts of each case.

The facts indicate that there were a series of interconnected gambling businesses operating in Texas. The Dallas-Fort Worth operation was at the hub of these operations, serving as a source of line information and a lay off point. The satellite operations were the Amarillo operation, the subject of the prosecution in *United States v. Clements, supra*, the Austin operation, and the San Antonio operation. The latter two operations were basically small one-man affairs. The Amarillo operation, on the other hand, was much more substantial. In each case, Dallas-Fort Worth accepted lay off bets from and gave line information to the other businesses. In addition, Dallas-Fort Worth accepted bets from "nonprofessional" bettors who were not conducting a gambling business.

This case is conceptually difficult. If Robinson and Miller had been demonstrated to be a part of the Amarillo operation in *Clements* by personal activities separate and apart from their operation of the Dallas-Fort Worth gambling business, they could not claim double jeopardy. It is possible for an individual to conduct more than one business. On the other hand, even if such activities were a part of the Dallas-Fort Worth operation, but that operation consisted of several individual businesses, neither could claim double jeopardy for conducting each of those businesses. For instance, if part of the Dallas-Fort Worth operation accepted lay off bets from and provided line information to Amarillo as a separate business and did the same thing with the gambling businesses in Austin and San Antonio, defendants might conceivably be charged with conducting each of those separate businesses without being placed in double jeopardy. Likewise, if the Dallas-Fort Worth operation consisted of a "wholesale" business, engaged in regularly accepting substantial lay off bets from and exchanging line information with other professional gambling businesses, while at the same time conducting a separate "retail" business by accepting bets from customers who are not themselves conducting a gambling business, there would be no double jeopardy problem from separate convictions.

The difficulty with the Government's argument in this case, however, is that the facts do not support any of these hypothetical "separate business" conceptions.

The evidence tends to show the Dallas-Fort Worth business as a unified whole. Miller appears as its central figure with the other defendants serving in secondary positions. Robinson's role included assisting in operating the telephone lines. The evidence does not indicate that there was any differentiation between the business of taking lay off bets from other operations and of taking bets directly from bettors. No separate books, telephone lines, code systems, or the like were introduced into evidence. The facts merely show an operation with an internal and external aspect. The two

Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

were so intertwined that it is impossible to separate them. The volume of the internal business, for example, permitted the operation to handle lay off bets from outside Dallas. There is no apparent line of demarcation in the Dallas-Fort Worth operation by which it can be carved into two or more separate businesses.

The Government suggests that Miller and Robinson should be regarded as members of the Amarillo business for purposes of *Clements*, and as members of the Dallas-Fort Worth operation for purposes of this case. The facts indicate, however, that the focus in *Clements* was on the Dallas Bookmaking Operation (a headnote in the Government's brief in *Clements*). It was not shown that Miller and Robinson played any direct individual role in the operation of the Amarillo business nor that their involvement was distinguishable from their conduct of the Dallas-Forth Worth business.

In prosecuting interdependent operations such as those involved in the instant case and *Clements*, the Government has considerable flexibility. Where the evidence shows a substantial linkage between two independent operations, the Government may treat the operations as one business for purposes of 18 U.S.C.A. § 1955. If it chooses to do so, it may include all persons involved in the interrelated operations to arrive at the prerequisite five. It may not, however, without more treat the same persons as being involved in separate businesses in another prosecution to avoid double jeopardy. Because defendants Miller and Robinson have been convicted of conducting the Dallas-Forth Worth gambling operation in *United States v. Clements, supra*, their convictions in the instant case constitute double jeopardy and must be reversed.

[6] In this connection, it must be noted that the indictments in the two cases were identical, except for the naming of different codefendants in each case, and the same wiretap produced the bulk of the evidence in both cases. The effect of the holding that defendants Miller and Robinson may not be twice convicted for operating one gambling business does not mean, of course, that they may not be counted in the instant case toward the "five persons" necessary under the statute for the conviction of any other persons involved in the business.

Davis

Having reversed the convictions of Miller and Robinson, it is necessary to take up the issues raised by the remaining defendant, Davis. Three points are raised: grounds for a mistrial based on remarks made by the prosecutor in the presence of jury members; error in failure to give requested instructions; and the presence of probable cause for the wiretap and search warrants.

(1) *Motion for a Mistrial*

[7] Codefendant Stone called an expert witness, Joey Boston, a Las Vegas bookmaker, who testified that Stone's intercepted conversations were mere bets and not lay off bets. At the conclusion of his testimony, Stone's counsel requested that Mr. Boston be excused. The prosecutor, Mr. Badger, offered no objection and the witness was excused. Afterwards Mr. Badger approached Stone's counsel at the elevator outside the courtroom and asked that Boston not be released so that he might be recalled for further testimony. Stone's counsel declined because Mr. Boston had to catch a plane. After an interchange, Mr. Badger remarked that "he was going to run off anyway so it didn't make any differ-

ence." This incident occurred within earshot of several jurors.

Stone made a timely motion for mistrial in which he was joined by the other defendants. Ruling that the remarks were not so inflammatory as to result in prejudice, the trial court denied the motions. The court instructed the jury to disregard the incident. Mr. Boston's testimony apparently was not discredited because Stone was acquitted. A review of the record convinces us that the court's instructions were sufficient to remedy any prejudice which may have occurred.

(2) *Instructions*

[8] Davis contends the court erred in failing to instruct the jury with regard to the necessity of a constant exchange of line information. Defendant misperceives the relevance of such an instruction. Exchange of line information becomes an issue only where independent operations are linked together. Defendant Davis' role was hardly that of an independent operator. The facts tend to show that he assisted Miller in running the Dallas-Fort Worth business, maintained records, and calculated the division of profits. The facts showed all the jurisdictional requirements of § 1955 to be met in the Dallas-Fort Worth operation, without including any other operations. An instruction on exchange of line information would not have helped Davis. In any event, the court's instruction regarding the interrelationship of independent operations correctly stated the law. *See United States v. Clements*, —— F.2d —— (5th Cir. 1979) [No. 77–5492].

(3) *Probable Cause for Wiretaps and Search Warrant*

Defendant Davis also urges that materials produced as a result of a telephone wiretap and search be suppressed because the warrants are invalid. The warrants challenged in this case are the same warrants which were upheld in *United States v. Clements, supra.* For the reasons stated in that opinion, we affirm the trial court's denial of defendant's motion to suppress.

Conclusion

Having concluded that defendants Miller and Robinson have twice been placed in jeopardy for the same offense in violation of the Constitution, we reverse their convictions. The trial court, however, properly dismissed defendant Davis' motion for a mistrial, refused the requested instruction, and admitted evidence gathered from the wiretap order and search warrant. Davis' conviction, therefore, is affirmed.

REVERSED IN PART and AFFIRMED IN PART.

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APPENDIX B

§ 2518. Procedure for interception of wire or oral communications [§§ (1) thru (3) only]

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the de-

scribed type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

APPENDIX C

§ 1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives

gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.